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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1388**

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

v.

CHARLES F. WHITE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## BRIEF OF THE RESPONDENT

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## BRIEF OF THE RESPONDENT

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## OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1977) 2805, 371 N.E. 2d 777 (1977) (A. 72).

## JURISDICTION

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. section 1257(3).

The respondent respectfully suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. section 1257(3) because the judgment lacks finality.

Additionally, respondent maintains that because the decision of the Supreme Judicial Court may rest on an adequate and independent state ground, that this Court should either dismiss the writ of certiorari as improvidently granted or remand the case to the Supreme Judicial Court of Massachusetts for clarification of the basis of its decision.

## QUESTIONS PRESENTED

1. Whether the decision of the Supreme Judicial Court of Massachusetts reversing a judgment of guilty and setting aside findings of a trial judge who denied in part a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. section 1257(3).

2. Whether this honorable Court should dismiss the writ of certiorari as improvidently granted or remand the case to the Supreme Judicial Court of Massachusetts to determine if its decision is based on an adequate and independent state ground.

3. Whether the fruit of a statement held inadmissible at trial because the defendant was incapable of waiving his right against self-incrimination may be used as evidence in the prosecution's case in chief.

4. Whether the respondent's Sixth Amendment right to counsel was violated by his being interrogated by a police officer who did not regard the respondent as having waived his rights to silence and counsel; said



interrogation having taken place after the respondent's repeated attempts to secure an attorney had failed.

## CONSTITUTIONAL PROVISIONS INVOKED

1. The United States Constitution Amendment 4; "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The United States Constitution Amendment 5; "No person . . . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . . ."

3. The United States Constitution Amendment 6; "In all criminal prosecutions, the accused shall enjoy the right . . . . .to have the Assistance of Counsel for his defence.

4. The United States Constitution Amendment 14; "Section 1, . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . ."

5. Constitution of the Commonwealth of Massachusetts Pt. 1, Article XII; "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to

produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. . . . . "

## STATEMENT OF THE CASE

### Prior Proceedings

On September 9, 1975, the Franklin County Grand Jury returned four indictments charging the respondent, Charles F. White, with unlawful possession with intent to distribute controlled substances, namely marihuana, amphetamines, cocaine and L.S.D. in violation of Massachusetts General Laws, chapter 94C section 31.

On October 25, 1975, the respondent filed a Motion to Suppress Evidence with affidavit, seeking to suppress statements made while in custody and property seized from an automobile the result of a search warrant.

On January 29, 1976, after a pre-trial hearing, a judge of the Superior Court of the Commonwealth issued "Findings and Rulings in Re Motion to Suppress Evidence". The judge found that the Commonwealth had failed to demonstrate that the respondent had knowingly and intelligently waived his privilege against self-incrimination and his right to counsel and therefore, the respondent's statements must be suppressed. (A. 62-63).

However, the judge went on to find that the statement could be used to establish probable cause for



the issuance of a search warrant and declined to suppress the drugs and currency seized from the trunk of the automobile, pursuant to said search warrant (A. 68). The respondent filed an exception to the "Findings and Rulings" (A. 69).

On appeal, the Supreme Judicial Court, in a unanimous decision, reversed. The Supreme Judicial Court upheld the Superior Court judge's determination that the respondent had not waived his right to counsel or his privilege against self-incrimination (A. 77-78). The court further held that the illegally obtained statement could not be used to establish probable cause to obtain a search warrant and that evidence seized during the execution of the search warrant must be suppressed. Commonwealth v. White, ____ Mass. ____, Mass. Adv. Sh. (1977) (A. 72).

### Statement of the Facts

The facts as found by the Superior Court judge in his "Findings and Rulings in Re Motion to Suppress Evidence" (A. 59-68) and adopted by the Supreme Judicial Court (A. 72-81), may be summarized as follows.

On March 28, 1975 at approximately 2:00 A.M., Walter Zalenski, Chief of Police of the town of Ashfield, after notification of an automobile accident had proceeded to the scene. Chief Zalenski found the respondent behind the wheel of an automobile that had gone off the road and over an embankment (A. 60, 73).

Chief Zalenski noticed that the defendant appeared to be under the influence of either drugs or alcohol or

both (A. 60, 73). His eyes appeared glassy, his speech was somewhat slurred and there was a strong odor of alcohol on his breath (A. 60). The Chief ordered the respondent from the motor vehicle, read him the *Miranda* warnings and placed him under arrest for operating under the influence (A. 60, 73). The respondent walked up to the police cruiser without assistance but with some degree of staggering (A. 60, 73).

Chief Zalenski called the Massachusetts State Police for assistance. Trooper Frederick Taliaferro arrived at the scene and was told by the Chief that the respondent was under arrest. The Chief requested that Trooper Taliaferro administer the respondent a breathalyzer test at the State Police Barracks (A. 60).

Upon arrival at the barracks Trooper Taliaferro read the respondent the *Miranda* warnings and advised him of his right to a breathalyzer test and his right to make a telephone call. The respondent agreed to submit to the breathalyzer test (A. 60, 74).

Prior to the administration of the test, the respondent attempted to use a coin operated telephone to retain the services of an attorney (A. 61, 74). The respondent had difficulty using the telephone, dropping coins on the floor several times (A. 61, 74). He succeeded in completing two calls but was unable to obtain representation (A. 61, 74). The respondent at no time indicated that he intended to abandon his efforts to secure representation or that he had changed his mind with regard to that objective (A. 63, 77). Trooper Taliaferro did not regard the respondent as having waived his right to silence or his right to counsel. (A. 63, 77).



The Superior Court judge and the Supreme Judicial Court also found that during this time at the barracks that the respondent "bounce(d) around," was "bouncing off the walls", was scratching himself in an unusual manner and "didn't know what he was doing" (A. 63, 74).

The respondent took a breathalyzer test with a result of thirteen one hundredths percentage by weight of alcohol in the respondent's blood. This result created a statutory presumption that the respondent was under the influence of alcohol.[1]

While preparing to place the respondent in a cell, Trooper Taliaferro searched the respondent and found what appeared to be a marihuana cigarette. The trooper informed the respondent he would be charged with possession of marihuana and again read the *Miranda* warnings (A. 61, 74). The respondent replied that he saw nothing wrong in the possession of one marihuana cigarette (A. 61, 74).

Trooper Taliaferro then questioned the respondent if he had any other marihuana on his person or in his car and the respondent replied that he had some marihuana in his car (A. 61-62, 74). The respondent also stated that he could name some "biggies" to which the trooper replied that he did not wish to inquire any further (A. 62, 74).

After securing the respondent in a cell, Trooper Taliaferro sought a search warrant for the automobile (A. 62, 74-75). The affidavit in support of said application stated in material part:

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[1] Massachusetts General Laws chapter 90, section 24 (1)(e) provides that a reading of "ten one hundredths or more" creates a presumption that a person is under the influence of intoxicating liquor.

"On March 28, 1975 I assisted Chief Walter Zalenski (sic) Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his Miranda rights (sic). I than (sic) searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt color green (sic). I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest" (A. 55-56, 62, 75).

A search warrant was issued based on this affidavit (A. 57-58). The search of the motor vehicle resulted in the seizure from the trunk of various controlled substances and cash (A. 58-59, 62). That property and the respondent's oral statements to Trooper Taliaferro were the subjects of the respondent's Motion to Suppress Evidence. (A. 60, 75).

## SUMMARY OF ARGUMENT

This case involves the admissibility of evidence seized during the execution of a search warrant. The affidavit in support of the search warrant was based on a statement which was illegally obtained in violation of the safeguards of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Fifth and Sixth Amendments to the Constitution of the United States and Part 1 Article XII of the Constitution of the Commonwealth of Massachusetts.

The court below found that the respondent had not knowingly or intelligently waived his rights to counsel



or his privilege against self-incrimination and that his statement could not be used to establish probable cause for the issuance of the search warrant. The court concluded that controlled substances and currency seized pursuant to the search warrant must be suppressed.

The respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, that the judgment of the court below is an inadequate basis for jurisdiction under 28 U.S.C. section 1257(3) because the judgment lacks finality.

Additionally, it is submitted that because the decision of the court below may have been based on violations of the Constitution of the Commonwealth of Massachusetts, Pt. I Article XII, this Court should dismiss the writ of certiorari as being improvidently granted. In the alternative, it is suggested that "consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended" Herb v. Pitcairn, 324 U.S. 117, 128 (1945), this Court should remand the case to the Supreme Judicial Court of Massachusetts to determine the basis of its decision.

Respondent suggests five separate but interrelated arguments that support his contention that the unanimous decision of the Supreme Judicial Court should be affirmed.

1. The questioning of the respondent absent a valid waiver, and in the circumstances of the case at bar violated both *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment. The requirement of a valid waiver is "fundamental with respect to the Fifth Amendment privilege". *Miranda* supra at 476.

Respondent concedes that the Miranda warnings and waiver procedure is not the only possible solution to the problem of the inherent compulsion of the interrogation process but it is contended that the Fifth Amendment requires that they be observed until other procedures are formulated which are at least as effective in protecting the accused's rights to silence and counsel.

Additionally, *Michigan v. Tucker*, 417 U.S. 433 (1974) is distinguishable from the case at bar. *Tucker* involved pre-Miranda interrogation while the questioning in the case at bar took place many years post-Miranda. Further, the defendant in Tucker did not accuse himself and when asked if he wanted an attorney, he replied he did not. In contrast, the respondent's statement in the case at bar was accusatory and the respondent affirmatively demonstrated that he was desirous of counsel. Moreover, the police officer who questioned the respondent did not regard the respondent as having waived his rights to silence or counsel.

Additionally, the respondent submits that his statement, unlike the statement in Tucker, was involuntary.

2. The evidence obtained pursuant to the execution of the search warrant must be suppressed because it was obtained as the result of a violation of the respondent's Fifth Amendment rights. Respondent suggests that the admission of said evidence would violate *Miranda*, the Fifth Amendment and the theory underlying the fruit of the poisonous tree doctrine.

This Court in *Miranda* stated that "until such warnings and waiver are demonstrated by the



prosecution at trial, *no evidence obtained as a result of interrogation can be used against him*". *Miranda* supra at 479 (emphasis supplied).

Further, if the police were allowed to use illegally obtained statements for leads, the *Miranda* requirements would be meaningless for the police could accomplish indirectly what they could not do directly.

Additionally, the Fifth Amendment by its own terms requires suppression in the case at bar. Unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. *United States v. Janis*, 428 U.S. 433, 443 (1976). Therefore, the deterrent rationale of the Fourth Amendment exclusionary rule is not applicable to the case at bar.

Further, this Court has consistently held that the Fifth Amendment requires that evidence derived from compelled testimony is not admissible. *Murphy v. Waterfront Commission* 378 U.S. 52 (1964).

Finally, the fruit of the poisonous tree doctrine is applicable to the case at bar and requires suppression.

3. The evidence seized from the automobile must be suppressed as the fruit of a violation of the respondent's Sixth Amendment right to counsel. Both the Superior Court judge and the Supreme Judicial Court found that the respondent had affirmatively demonstrated a desire for counsel and never changed his mind in that regard. Additionally, the state trooper did not regard the respondent as having waived his right to counsel. Questioning under these circumstances violated the Sixth Amendment and evidence derived from the illegal interrogation should be suppressed. (see, e.g., *Escobedo v. Illinois*, 378 U.S. 478, (1964); *Brewer v. Williams*, 430 U.S. 387 (1977).

4. The illegally obtained statement was a critical element in the affidavit in support of the search warrant and therefore evidence seized pursuant to said search warrant must be suppressed. *United States v. Giordano*, 416 U.S. 505 (1974). Alternatively, without the illegally obtained statement, there was no probable cause for the issuance of the warrant and evidence seized pursuant to said warrant must be suppressed. (see e.g., *United States v. Giordano* supra at 555, dissenting opinion of Powell, J.)

5. Even if the questioning violated only the *Miranda* prophylactic safeguards, the decision below should be affirmed. The interest of the government in making available to the trier of fact all available evidence is outweighed by the need to provide effective sanctions to uphold constitutional rights. The allowance into evidence of the controlled substances and currency which were seized pursuant to the search warrant would encourage the police to violate the law because they would have everything to gain and nothing to lose by interrogating defendants without obtaining a valid waiver. Suppression is necessary to exhibit to the police the fact of judicial disapproval and makes constitutional rights credible to the police.

Moreover, doubt as to the effectiveness of the Fourth Amendment exclusionary rule in deterring illegal police activity is not applicable to Fifth and Sixth Amendment violations.

Additionally, the good faith factor is not applicable to the case at bar. Alternatively, sound policy reasons argue against the use of a good faith defense in situations like the case at bar. A good faith defense puts a premium on ignorance and would lead to an



exceptionally difficult fact finding process. Additionally, it would generate uncertainty, thereby defeating a primary goal of *Miranda*.

Further, the concept of judicial integrity requires suppression. The allowance into evidence of the fruits of the illegal interrogation would encourage the police to violate the constitution.

Finally, the nature of our adversary system and the importance of the dignity and integrity of the individual require affirmance of the decision of the court below.

## ARGUMENT

### POINT 1

### THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS LACKS FINALITY AND IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. SECTION 1257(3).

It is settled that the Supreme Court of the United States has appellate jurisdiction of state litigation "only after the highest state court in which judgment could be had has rendered a (f)inal judgment or decree". *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477 (1975).

Respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, the Supreme Judicial Court's decision is not "final".

It is submitted that the denial of the motion to dismiss for lack of finality in *California v. Stewart*, 384 U.S. 436, 498 n. 71 (1966), did not create an unvarying rule that all decisions of a state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under 28 U.S.C. section 1257(3). See, e.g., *Cohen v. New York*, 385 U.S. 976 (1966).

Further, respondent contends that this Court's limitation in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949) that "we do not mean that every order fixing security is subject to appeal; (h)ere it is the right to security that presents a *serious and unsettled question*," (emphasis supplied) is applicable to the case at bar.

## POINT 2

**SINCE THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS MAY BE BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND, THIS HONORABLE COURT SHOULD EITHER DISMISS THE OF CERTIORARI AS IMPROVIDENTLY GRANTED OR REMAND THE CASE TO THE SUPREME JUDICIAL COURT TO CLARIFY THE BASIS OF ITS DECISION.**

It is established that the United States Supreme Court "will not review judgments of state courts that rest adequate and independent state grounds". *Herb v. Pitcairn*, 324 U.S. 117, 125 (1944). Respondent



contends that the decision of the Supreme Judicial Court of Massachusetts is unclear as to whether it was based on interpretation of the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts or both.

The respondent, in his Motion to Suppress Evidence, (A. 18-19) alleged violations of his rights against self-incrimination and counsel contained in both the Constitution of the United States and Part 1, Article XII of the Constitution of Massachusetts.[2]

In its decision in the case at bar, the Supreme Judicial Court relied on two Massachusetts Supreme Judicial Court opinions in concluding that the respondent's statement could not be used to establish probable cause for the issuance of a search warrant. The Supreme Judicial Court cited *Commonwealth v. Hall*, 366 Mass. 790, 795 (1975) as holding that "evidence obtained in violation of constitutional guarantees against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant (A. 78) and *Commonwealth v. Haas* ____ Mass. ____ Mass. Adv. Sh. (1977) 2212, 369 N.E.2d 692 as holding that "evidence obtained in violation of the principles laid down in *Miranda v. Arizona*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to an arrest". (A. 78)

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[2]Part 1, Article XII of the Constitution of Massachusetts states in relevant part: "No subject shall . . . . be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to . . . . . be fully heard in his defence by himself, or his counsel, at his election. . . . ."

The Supreme Judicial Court went on to state that:

> "From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. . . . Although this exact issue has not been determined by the Supreme Court, but cf. Michigan v. Tucker, 417 U.S. 433 (1974), we believe that *Haas* controls the issue *in this Commonwealth*". *Commonwealth v. White*, supra at 2812-2813, (A. 78) (emphasis supplied).

The case at bar is not one in which the Supreme Judicial Court reluctantly applied federal constitutional law. The Supreme Judicial Court reversed the convictions because "to hold otherwise would, in effect, sanction the initial violations of constitutional guarantees which the judge found took place in the police barracks" *Commonwealth v. White* supra at 2812, (A. 78).

This reasoning indicates that the Supreme Judicial Court came to an independent conclusion that failure to suppress the contraband and money would encourage police misconduct and sanction violation of the respondent's rights to counsel and his privilege against self-incrimination. As Mr. Justice Marshall has stated:

> "This is precisely the setting in which it seems most likely that the state court would apply the State's self-incrimination clause (or right to counsel) to lessen what it perceives as an intolerable risk of abuse". *Oregon v. Hass*, 420 U.S. 714, 729 (1975) (dissenting opinion of Marshall, J.)

In regard, *Commonwealth v. Romberger*, 464 Pa. 488, 347 A.2d 460 (1975) is instructive. In an earlier



decision, the Pennsylvania Supreme Court had reversed Romberger's conviction holding inadmissible statements elicited from the defendant without his being advised of his right to appointed counsel if he was indigent. *Commonwealth v. Romberger*, 454 Pa. 279, 312 A.2d 353 (1973). The Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari which was granted. By order of June 17, 1974, 417 U.S. 964, the United States Supreme Court vacated the order of the Pennsylvania Supreme Court and remanded in view of the decision in *Michigan v. Tucker*, 417 U.S. 433 (1974).

After rehearing, the Pennsylvania Supreme Court reaffirmed its earlier decision holding that the statements must be excluded under both the Fifth Amendment of the Constitution of the United States and Article 1 section 9 of the Constitution of Pennsylvania which mandates that a defendant be apprised of his right to free counsel if he is unable to otherwise secure one. The Pennsylvania Supreme Court concluded that:

> "(E)ven if Tucker, supra has relaxed the requirement for the imposition of the rule of exclusion for this type of Miranda violation, in absence of a record showing that the defendant was aware of this right, the Commonwealth has failed to meet its burden to demonstrate that the waiver of this State right was knowingly made". 347 A.2d at 464.

Respondent submits that this Court should "choose the interpretation (of the decision of the Massachusetts Supreme Judicial Court) which does not face (the Court) with a constitutional question". *Black v. Cutter Labs*, 351 U.S. 292, 299 (1956) and dismiss the writ of certiorari as improvidently granted.

Alternatively, respondent respectfully suggests that "consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended", *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945), that this Court remand the case to the Supreme Judicial Court of Massachusetts to determine the basis of its decision.[3]

## POINT 3

### THE QUESTIONING OF THE RESPONDENT UNDER THE CIRCUMSTANCES OF THE CASE AT BAR VIOLATED HIS FIFTH AMENDMENT RIGHTS.

*Miranda v. Arizona*, supra, was the first case to declare that the privilege against self-incrimination applied to state police interrogation techniques.

In each of the four companion cases involved in *Miranda*, the defendants had been arrested, questioned

[3]See e.g. *People v. Krivda*, 12 Cal. App. 3d 963, 91 Cal. Rptr. 219 (1970), aff'd, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971) (en banc), cert. granted, 405 U.S. 1039, vacated and remanded for clarification sub. nom. *California v. Krivda*, 409 U.S. 33 (1972) (per curiam), aff'd on rehearing, 8 Cal. 2d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (per curiam) cert. denied, 412 U.S. 919 (1973) where this Court after granting certiorari remanded the case to the California Supreme Court to determine whether the California court had based its decision of the Fourth Amendment to the United States Constitution or upon the equivalent provisions of the California Constitution or both. The Supreme Court of California held that it had "relied upon both the Fourth Amendment to the United States Constitution and Art. I section 19 of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result . . . . . reached in the opinion". 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).



at a police station without full warnings of constitutional rights and confessions were obtained. These confessions were used at trial to gain convictions.

The Court conceded that the confessions might not "have been involuntary in traditional terms" 384 U.S. at 457, but concluded that to offset the compulsion inherent in custodial interrogation, safeguards were needed to make certain that the defendant has a "full opportunity to exercise the privilege against self-incrimination". 384 U.S. 457.

The Court went on to hold that the prosecution in a criminal case may not use statements the result of custodial interrogation unless it demonstrated the use of procedural safeguards to protect the privilege against self-incrimination. The Court stated that:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed". 384 U.S. at 444.

Additionally, the Court held that the defendant may waive these rights, provided that the waiver was made voluntarily, knowingly and intelligently. 384 U.S. at 444.

Further, the Court stated that if the defendant indicates in any manner at any time prior to or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must cease. 384 U.S. at 444-45.

Respondent contends that the questioning of the respondent absent a valid waiver, violated both the

principles enunciated in *Miranda* and the Fifth Amendment. In the case at bar, both the Superior Court judge and the Supreme Judicial Court found that the Commonwealth had not demonstrated that the respondent had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. (A. 62-63, 76-78).

Additionally, both found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel and had at no time indicated . . . . . he had changed his mind in that regard". (A. 62-63, 77). It was further found that the state trooper did not regard the defendant as having his right to silence or his right to counsel. (A. 63, 77).

It is therefore clear that the trooper's questioning violated a mandate of Miranda that "if the defendant indicated in any manner at any time prior to or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must cease". *Miranda* supra at 444-45.

Respondent respectfully suggests that the questioning in the case at bar violated the respondent's Fifth Amendment rights for as Chief Justice Warren stated: "(t)he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege". *Miranda* supra at 476.

Additionally, this Court in Miranda stated that the decision was meant to "give concrete *constitutional* (emphasis supplied) guidelines for law enforcement agencies and courts to follow". Miranda supra at 441-42.

Moreover, this Court in *Orozco v. Texas*, 394 U.S. 324 (1969), in ruling a statement inadmissible because



obtained in violation of Miranda, stated that "the use of these admissions in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment". 394 U.S. at 326.

It is conceded that the Miranda warnings and waiver procedure was not the only possible "solution for the inherent compulsions of the interrogation process" *Miranda* supra at 467, but it is contended that the Fifth Amendment requires that they must be observed at least until "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" *Miranda* supra at 467, are demonstrated.

Additionally, it is well established that this Court has no supervisory power over state courts. "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis". *Michigan v. Tucker* supra at 462 (dissenting opinion of Douglas, J.)

Therefore, respondent submits that at least the Miranda requirement of a knowing and intelligent waiver must be constitutionally mandated and the questioning of the respondent without a valid waiver violated the Fifth Amendment.

Moreover, it is submitted that *Michigan v. Tucker*, 417 U.S. 433 (1974) is not applicable to the case at bar. In *Tucker*, this Court held admissible the testimony of a witness whom the police discovered as a result of a defendant's statement which was obtained by the police without the defendant being advised that he had a right to free counsel if he could not afford representation. The Court found that the police conduct violated only the prophylactic rules developed by *Miranda* and not the constitutional provision against self-incrimination.

*Tucker* is distinguishable from the case at bar on several grounds. In *Tucker*, the questioning of the defendant took place before the *Miranda* decision, *Tucker* supra at 435, while in the case at bar, the questioning occurred many years after *Miranda*. (A. 73). Indeed, this Court in *Tucker* stated that "we consider it significant to our decision in this case that the officer's failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda". *Tucker* supra at 447.

Additionally, the defendant in *Tucker* did not accuse himself, *Tucker* supra at 449, while the statement in the case at bar was accusatory.

Further, as this Court stated in *Tucker*:

> "The record is also clear that respondent was asked whether he wanted an attorney and that he replied that he did not. Thus, his statement could hardly be termed involuntary as that term has been defined in the decisions of this Court". *Tucker* supra at 444-45.

This stands in marked contrast to the findings of the Superior Court judge and adopted by the Supreme Judicial Court in the case at bar that the respondent:

> ". . . (H)ad affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful . . . . . he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel" (A. 63, 77).



Additionally, respondent contends that unlike *Tucker*, his statement was involuntary and therefore obtained in violation of his right not to be compelled to self-incriminate himself. At the hearing on the Motion to Suppress, (A. 22-55), the following questions were asked by the respondent's attorney, Mr. Silverman and the answers are those of Trooper Taliaferro.)

> Q. Was the phone call made at that time after the search of the defendant?
> A. I really don't recall; so many attempts, I really don't recall whether this particular one was after, before, or-
> Q. Other attempts unsuccessful because Mr. White physically unable to use the phone?
> A. In the beginning he was able to some extent. Apparently he tried calling home, tried calling various places. A little later he just was physically—couldn't do anything, he was starting to bounce off the walls. At that point I decided he was through with phone—unable to make them then, I placed in the cell.
> Q. —the phone call he had conversation with?
> A. I cannot recall.
> Q. Was that at the same time?
> A. As I placed him in the cell? No, previous to being placed in the cell.
> Q. At some point you decided he could not make phone calls?
> A. He was proceeding to climb the walls and bounce around and didn't know what he was doing. At this point he was placed in the cell.
> Q. Was that after conversation?

A. Definitely after he had conversation with one attorney apparently trying to contact other attorneys.
Q. Can you describe his condition at the time—appeared to be under the influence?
A. Most certainly did appear to be under the influence and some narcotic. His eyes were watery and just—he didn't have too much control over him. He was scratching all night long and some statements incoherent.
Q. Breathalyzer reading .13?
A. That is correct.
Q. Which is not necessarily enough to make someone bounce off the walls?
A. No, it is not.
Q. Your conclusion he may have been under the influence of something else?
A. I came to that conclusion before the results—the breath test. (A. 48-49).

It is clear that the Supreme Judicial Court gave credence to this testimony by its findings that the defendant "bounce(d) around, climb(ed) the walls, was scratching himself in an unusual way and "didn't know what he was doing" (A. 74).

Additionally, the respondent had taken a breathalyzer test with a result of thirteen one hundredths percentage by weight of alcohol in his blood. (A. 61). The result of this test created a statutory presumption that the respondent was under the influence of intoxicating liquor pursuant to Massachusetts General Laws chapter 90 section 24(1)(e).

Finally, it was established that the respondent had difficulty trying to use the telephone and dropped coins



on the floor several times while attempting to do so. (A. 61, 74).

It is submitted that these facts lead to the conclusion that the respondent's statement was involuntary in a Fifth Amendment sense. As one commentator, in discussing voluntariness under the Fifth Amendment has stated:

> "In contrast to due process, the self-incrimination clause establishes a privilege of silence that is broader than fundamental fairness, one that seeks to insure a meaningful standard of voluntariness in obtaining statements rather than merely control over forms of coercion. The significance of the distinction lies in the fact that voluntariness and coercion are not necessarily opposite sides of the same coin. Some "involuntary" statements are clearly the product of physical or psychological force. But the Court's movement to a free will standard in the progression of coerced confessions cases was meant to signify its rejection of subtle police methods to secure statements, even when not overtly compelled.". Burger, *"Unprivileged Status of the Fifth Amendment"*, 15 Am. Crim. L. Rev. 191, 202-203 (1978).

This free will standard is exemplified in the pre-Miranda decision of *Townsend v. Sain*, 372 U.S. 293 (1963) where this Court stated that "any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders the confession inadmissible". 372 U.S. at 306.

It is contended that the respondent's condition at the time of questioning precluded his making a statement which would be the product of a free intellect and was therefore involuntary under standards applicable both before and after the *Miranda* decision.

## POINT 4

### THE EVIDENCE OBTAINED FROM THE RESPONDENT'S AUTOMOBILE MUST BE SUPPRESSED BECAUSE IT WAS OBTAINED AS THE RESULT OF A VIOLATION OF THE FIFTH AMENDMENT.

Respondent contends that the decision of the Supreme Judicial Court, requiring exclusion of the evidence obtained from the trunk of the respondent's automobile was correct in that the admission of said evidence would violate *Miranda*, the Fifth Amendment and the rationale of the "fruit of the poisonous tree" doctrine.

This Court, in *Miranda*, addressed itself to the issue of the admissability of evidence derived from an illegally obtained statement by stating: "But unless and until such warnings and waiver are demonstrated by prosecutor at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda* supra at 479.

Further, Justice Clark, in his dissenting opinion, explained the effect of the majority's decision by stating that "(t)he Court further holds that failure to follow the new procedure requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof" *Miranda* supra at 500.

Indeed, the National District Attorneys Association has opened that Miranda mandates suppression of evidence obtained as a result of an illegally obtained statement by stating:



> "It has come to my attention that there are some who would argue that while a statement or confession is inadmissible under the Miranda doctrine, nevertheless, that evidence obtained by virtue of the statement (e.g. "The gun I used is located under the sycamore tree".) would be admissible. Obviously, this would be the fruit of the poisonous tree and inadmissibie as is evidence obtained after an illegal arrest or as a result of illegal wiretapping, and as is a confession obtained after an illegal arrest. . . . even if otherwise they would be admissible . . . To argue differently would destroy the whole basis for the rule in the first instance." Nedrud, 2 Journal of the National District Attorneys Association Foundation, 114 (1966).

Thus, most courts have held inadmissible, evidence derived from a Miranda violation. See e.g. *United States v. Castellana* 488 F.2d 65 (5th Cir. 1974) reversed on other grounds, 500 F.2d 325; *United States v. Harrison*, 265 F.Supp. 660 (S.D. N.Y. 1967); *United States v. Pellegrini*, 309 F.Supp. (S.D. N.Y. 1970); *People v. Paulen*, 308 N.Y.S. 2d 883 (3rd Dep't 1969); *People v. Schader*, 71 Cal. 2d 761, 457 P.2d 841 (1969) (en banc); *People v. Algien*, 501 P.2d 468 (Colo. 1972) (en banc). Contra, *Keister v. Cox*, 307 F.Supp. 1173 (W.D. Va. 1969).

Moreover, it is submitted that:

> "(I)f the police were permitted to utilize illegally obtained confession for links and leads rather than being required to gather evidence independently, than the Miranda warnings would be of no value in protecting the privilege against self-incrimination. The requirement of warning (and waiver) would be meaningless, for the police would be permitted to

accomplish indirectly what they could not accomplish directly and there would exist no incentive to warn". Pitler, *"The Fruit of the Poisonous Tree Revisited and Shepardized"*, 56 Cal. L. Rev. 579, 620 (1968).

Additionally, the Fifth Amendment by its own terms requires suppression in the case at bar. The Fifth Amendment's Privilege against Self-Incrimination's primary goal is to protect an individual "against being compelled to furnish evidence to convict him of a criminal charge". *Brown v. Walker*, 161 U.S. 591, 605-606 (1896).

Unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. This Court recently made referenee to this destinction by stating that "(i)n contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after and apart from the violation". *United States v. Janis*, 428 U.S. 433, 443 (1976)[4]

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[4]Respondent suggests that the reasoning of *United States v. Calandra* 414 U.S. 338 (1974); *United States v. Peltier*, 422 U.S. 531 (1975); and *United States v. Janis*, 428 U.S. 433 (1976) is not applicable to the case at bar. These cases dealt with the Fourth Amendment's exclusionary rule which is a judicially created remedy. The object of the exclusionary rule in the Fourth Amendment cases is to deter future unconstitutional police conduct, (See, e.g. *Elkins v. United States*, 364 U.S. 206, 217 (1960)), and the "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served". *United States v. Calandra*, supra at 348.

In contrast, the primary purpose of the Fifth Amendment's Privilege against Self-Incrimination as previously noted is protecting the individual against being compelled to furnish evidence to convict

*(continued)*



This Court has consistently held that the Fifth Amendment requires that evidence derived from compelled testimony is not admissible. In *Murphy v. Waterfront Commission*, 378 U.S. 52, (1964) this Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner . . ." 378 U.S. 79.

More recently, this Court has stated that "unless immunity is conferred, however, testimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of privilege." *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

*Kastigar v. United States*, 406 U.S. 441 (1972), is also relevant to the case at bar. In Kastigar, this Court was concerned with the scope of immunity necessary to protect the Privilege Against Self-Incrimination. The Court found that the federal use-immunity statute, 18 U.S.C. section 6002 was constitutional in that it ". . . . provides a comprehensive safeguard, barring use of

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*(footnote continued from preceding page)*
him of a criminal charge. The deterrence rationale is not applicable to Fifth Amendment violations because unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. When an individual makes a statement that is the result of illegal questioning, his privilege against self-incrimination is not violated; it is violated when the tainted evidence is used against him at trial. Thus, prohibiting the use of fruits of illegally obtained statements to be introduced at trial prevents a violation of the privilege and "even if the exclusion of evidence derived from a coerced confession is unlikely to have a deterrent effect on the police, its introduction will still represent an infringement on the individual's privilege against self-incrimination". Comment, 82 Yale L.J. 171, 178 (1972). See e.g. Ritchie, *"Compulsion that Violates the Fifth Amendment: The Burger Court's Definition"*, 61 Minn. L. Rev. 383, 417 n. 168.

compelled testimony as an investigatory lead". *Kastigar* supra at 460.

The Court went on to rule that a grant of immunity ". . . prohibits the prosecutorial authorities from using the compelled testimony *in any respect*". 406 U.S. at 453 (emphasis in original).

The respondent respectfully suggests that the Fifth Amendment interests involved in *Kastigar* are equivalent to those interests in the case at bar. Indeed, the Court, in *Kastigar* in reaching its decision drew an analogy to the use of an exclusionary rule in coerced confession cases. 406 U.S. at 461-62.

*People v. Robinson*, 48 Mich. App. 253, 210 N.W. 2d 372 (Mich. Ct. App. 1973) is also instructive. In *Robinson*, the defendant sought to suppress evidence derived from an involuntary confession claiming it was the fruit of the poisonous tree. The Michigan Court of Appeals, in allowing suppression, declared the fruit of the poisonous tree theory was an "intrinsic part of the Fifth Amendment" *Robinson* supra at 256, 210 N.W. 2d at 374. The court went on to state that:

> "Instead of urging us to establish a Fifth Amendment branch of the fruit of the poisonous tree doctrine, (the defendant) should have been arguing that such a branch was always present as an essential element of the Fifth Amendment guarantee". *Robinson* supra at 259-60, 210 N.W. 2d at 376.

The court in *Robinson*, after citing *Kastigar* and *Murphy v. Waterfront Commission*, supra, analogized the immunity cases to the case involving involuntary



statements. One commentator has suggested that such an analogy is correct because:

> "Exclusion of both primary and secondary evidence discovered through testimony compelled by grant of immunity serves as a substitute for the right of the individual to remain silent. Similarly, where illegal police conduct coerces the defendant to incriminate himself in derogation of the privilege, a bar to the use of such information reinstates the parties to their respective positions prior to the objectionable conduct, and restores the protection of the privilege to the accused". Note, 41 Brooklyn L. Rev. 325, 338 (1974).

Respondent contends that the Supreme Judicial Court's decision suppressing the contraband and currency found in the trunk of the automobile was correct in that it attempts to put the respondent in the position he was prior to the illegal questioning and upholds the protection of the Fifth Amendment.

Alternatively, respondent suggests that the Fourth Amendment fruit of the poisonous tree doctrine mandates suppression of the controlled substances and currency seized from the automobile.

The genesis of this Fourth Amendment doctrine was advanced in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In *Silverthorne*, federal officers unlawfully seized certain documents belonging to the Silverthornes and presented them to a grand jury which had already indicted them and their company. A district court ordered the return of the documents, but impounded photographs of the originals. The prosecutor then caused the grand jury to issue subpoenas to the defendants to produce the originals

and their refusal led to a contempt citation. In holding that the subpoenas were invalid because based on knowledge obtained from illegally seized evidence, Justice Holmes noted that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used all" 251 U.S. at 392.

The issue was thoroughly explored in *Wong Sun v. United States*, 371 U.S. 471 (1963). There, one Toy had made statements to federal agents and the statements were held inadmissible against him because they resulted from an illegal arrest. The statement led the agents to Yee. At Yee's home, the agents found narcotics which were introduced at trial against Toy.

This Court reversed Toy's conviction and held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery. The Court stated that the test was "whether granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488.

Respondent contends that the rationale of *Silverthorne*, supra is applicable to the case at bar. In *Silverthorne*, the subpoenas were invalid because based on knowledge illegally obtained, while in the case at bar, the search warrant was held invalid because it was based on an illegally obtained statement. The only difference is that in Silverthorne the original illegality involved violation of the Fourth Amendment while in the case at bar, the Fifth Amendment was violated.



The United States Fifth Circuit Court of Appeals applied the Wong Sun doctrine to violations if Miranda in *United States v. Castellana*, 488 F.2d 65 (5th Cir. 1974), reversed on other grounds, 500 F.2d 325. In *Castellana*, an agent of the Federal Bureau of Investigation, in executing a search warrant, abruptly asked the defendant if he had any weapons within reach. The defendant replied, "yes down there" indicating the lower desk drawer. The agent found four handguns and asked Castellana where he got them. The defendant stated he had taken them on loan.

The Fifth Circuit concluded that the statements had been illegally elicited and the handguns were the product of the illegal interrogation and ordered both the statements and handguns be suppressed. The court stated that "in *Wong Sun* terms, the guns were come at by exploitation of an illegality, improper interrogation". *Castellana* supra at 68.

Additionally, the Maryland Court of Special Appeals in applying *Wong Sun* to situations involving the Fifth Amendment has stated:

> "In the instant case we do not have an official action pursued in complete good faith with the confessions rendered inadmissible by the mere inadvertent omission of one of the prophylactic Miranda warnings. We have the confession being obtained in the absence of an effective waiver of the constitutional rights relating to self-incrimination and assistance of counsel to which appellant was entitled. The rationale of the holdings in *Harris* and *Tucker* does not apply to make admissible the tangible evidence obtained here, any more than it would apply to make admissible evidence derived from a confession not voluntary

in the traditional sense". In Re Appeal No. 245, 349 A.2d 434, 445 (Md. Ct. of Special Appeals) (1975).

Similarly, the defendant's statement in the case at bar was not the result of an inadvertent omission of a prophylactic Miranda warning. It was the result of the willful questioning[5] of a defendant who "had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to secure such assistance, (A. 63, 77); had been "bouncing off the walls" (A. 63, 74) and was statutorily presumed to be intoxicated (A. 63, 74). This is a case where an admission was obtained by intentional questioning without a valid waiver.

## POINT 5

**THE EVIDENCE SEIZED FROM THE RESPONDENT'S AUTOMOBILE MUST BE SUPPRESSED AS THE RESULT OF A VIOLATION OF THE RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.**

Both the Superior Court judge and the Supreme Judicial Court found that the respondent had placed at least two telephone calls in an attempt to obtain legal representation (A. 63, 74); had "affirmatively demonstrated a desire for the assistance of counsel"and had "at

[5]The Superior Court judge and the Supreme Judicial Court found that the state trooper did not regard the defendant as having waived his right to silence or his right to counsel. (A. 63, 77).



no time indicated . . . he had changed his mind in that regard" (A. 63, 77). Additionally, it was found that the "State trooper did not regard the defendant as having waived his right to silence or his right to counsel" (A. 63, 77).

The Supreme Judicial Court found that "on those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel". *Commonwealth v. White* supra at 2811, (A. 77).

Respondent contends that questioning under the circumstances of the case at bar violated the respondent's Sixth Amendment right to counsel and that any evidence derived from the illegal interrogation must be suppressed. See e.g. *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977).

## POINT 6

**SINCE THE ILLEGALLY OBTAINED STATEMENT WAS A CRITICAL ELEMENT OF THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT, THE MONEY AND CONTRABAND SEIZED PURSUANT TO THE SEARCH WARRANT MUST BE SUPPRESSED.**

The Superior Court judge and the Supreme Judicial Court agreed that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband" (A. 64, 79).

In *United States v. Giordano*, 416 U.S. 505 (1974) this Court held that evidence secured as a result of a court approved pen register whose application referred to logs of illegally monitored conversations, must be suppressed. The Court stated in footnote that "(i)n these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority". *Giordano* supra, at 534 n. 19.

Respondent respectfully suggests that the illegally obtained statement was a critical element in the affidavit in support of the search warrant and therefore fatally infected the warrant.

Moreover, it is submitted that the standard of the dissenting justices in *Giordano* has been met in the case at bar. Justice Powell, dissenting in *Giordano*, stated:

> ". . . (T)he inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence but whether putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause. *Giordano* supra at 555.

Since the Supreme Judicial Court determined that the application for the search warrant, considered without the tainted evidence, was insufficient to establish probable cause, (A. 79), it is contended that evidence secured as a result of the execution of the search warrant must be suppressed.



## POINT 7

## EVEN IF THE QUESTIONING OF THE RESPONDENT VIOLATED ONLY THE PROPHYLACTIC SAFEGUARDS OF MIRANDA V. ARIZONA, THE DECISION OF THE SUPREME JUDICIAL COURT SHOULD BE AFFIRMED.

As previously noted, Respondent contends that the questioning of the respondent in the circumstances of the case at bar violated *Miranda*, the Fifth Amendment and the Sixth Amendment.

However, assuming arguendo, that this Court rules that only the *Miranda* prophylactic safeguards and not the Fifth or Sixth Amendments were violated, the respondent suggests that the decision of the Supreme Judicial Court was correct.

As previously noted, *Michigan v. Tucker*, supra, differs from the case at bar in that *Tucker* involved an interrogation which took place before Miranda and involved the failure to give the required warning that the defendant would be furnished counsel free. *Tucker* supra at 436. Additionally, the defendant in *Tucker* did not accuse himself, 417 U.S. at 449, and when asked whether he wanted an attorney, he replied that he did not. 417 U.S. at 445.

In contrast, the case at bar is a post Miranda interrogation involving a defendant who was incapable of waiving his right against self-incrimination and right to counsel and the defendant's statement was accusatory. Additionally, the defendant affirmatively exhibited a desire for counsel and the police officer did not regard the defendant as having waived his rights to silence or counsel. (A. 63, 74, 77).

This Court in *Tucker*, after concluding that the actions of the police had not violated the Fifth Amendment and that *Wong Sun*, supra, was not applicable, went on to decide the issue as a "question of principle" Tucker supra at 446. The Court proceeded to balance the interests of the government of making available to the trier of fact all relevant evidence with the need to provide an effective sanction to uphold constitutional rights. Justice Rehnquist determined that the prime purpose of the Fourth Amendment exclusionary rule was the deterrence of future unlawful police conduct and went on to state that "(i)n a proper case this rationale would seem applicable to the Fifth Amendment context as well". Tucker supra at 447.

The Court in Tucker, after balancing the interests involved, concluded that testimony of a third party witness secured as a result of the defendant's statement was admissible.

Respondent respectfully suggests that the government's interest in using the evidence secured from the respondent's automobile is outweighed by the need to deter illegal police conduct, the requirement of judicial integrity and considerations of our accusatory system of justice.

The theory underlying the Fourth Amendment exclusionary rule is that barring the use of illegally obtained evidence will remove the incentive for the police to violate the law. See e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is submitted that the allowance of the introduction into evidence of the contraband and money seized in the case at bar would encourage the police to violate the law. The police would have everything to gain and



nothing to lose by questioning defendants without a valid waiver of constitutional rights. The suppression of the respondent's statement alone would not create sufficient deterrence because the police, knowing that the statement may lead to other evidence, would have an inducement to violate the law.

Further, the exclusionary rule is aimed at deterring future illegal conduct by the police generally. In order to accomplish this deterrence, it is necessary to effectively communicate the rule to police officers. To date, it has been clearly stated to the police that they cannot gain by violating rights of defendants. The carving out of exceptions to this rule would cloud this clear command. See e.g. Oaks, *"Studying the Exclusionary Rule in Search and Seizure,"* 37 U. Chi. L. Rev. 665, 710-711 (1970).

Professor Oaks has also pointed out that sanctions have other long range effects that help the police conform to the law. One important aspect of this is the moral or educative influence of the law.

> "The existence and imposition of a sanction reenforces the rule and underlines the importance of observing it. The principle is directly applicable to the exclusionary rule. . . . As a visible expression of social disapproval for the violation of . . . . guarantees, the exclusionary rule makes the guarantees . . . credible. Its example teaches the importance attached to observing them. Ibid at 711.

Respondent suggests that the decision of the Supreme Judicial Court in refusing "to sanction the initial violations of constitutional guarantees which . . . took place in the police barracks, *Commonwealth v.*

*White,* supra at 2812, (A. 78), exhibits judicial disapproval and makes constitutional rights credible to police officers.

Further, it is submitted that the doubt as to whether the Fourth Amendment exclusionary rule in fact does deter, *United States v. Janis*, 428 U.S. 433, 449-454 (1976) is not applicable to the Fifth and Sixth Amendment violations of the case at bat. As Professor Oaks has stated:

> " . . . (T)he predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence" Oaks supra at 665.

Other studies have also indicated that *Miranda* has had success in upholding Fifth Amendment rights. See e.g. Robinson, *"Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply"*, 1968 Duke L.J. 425, 481-92; Project, *"Interrogations in New Haven: The Impact of Miranda"*, 76 Yale L.J. 1519, 1615-16 (1967).

Moreover, it is suggested that the good faith factor mentioned in *Michigan v. Tucker* supra at 447, is not applicable to the case at bar. *Tucker* was pre-Miranda interrogation and the police officers were guided by the right to counsel during interrogation mandate of *Escobedo v. Illinois*, supra. In *Tucker*, "the police asked respondent if he wanted counsel,and he answered that he did not". *Tucker* supra at 447.

In contrast, the case at bar is post-Miranda, the respondent repeatedly attempted to secure counsel and never indicated that he intended to abandon his effort.



(A. 63). Additionally, the State trooper questioned the respondent knowing that the respondent had not waived his right to silence or counsel (A. 63, 77).

Further, it is submitted that sound policy reasons dictate against the use of a good faith factor in situations involving Miranda violations. As one commentator has stated:

> "Although the immediate impact of an application of the exclusionary rule is to penalize past police error, its longer range impact should be to induce individual police officers to learn the law governing their activities and to provide an incentive to police departments to train their employees as fully and completely as possible. Use of good faith defense undercuts this potential, for it places a premium on ignorance. Moreover, a good faith defense would add an additional and exceptionally difficult fact finding operation to the already overburdened criminal process. Except in the most unusual circumstances, determination of whether a mistake of law was "reasonable" is hardly an easy task. The existence of such a defense could generate uncertainty and invite calculated risks on the part of the police, thereby defeating a primary goal of Miranda". Stone, *"Miranda Doctrine in the Burger Court"*, 1977 The Supreme Court Review 99, 124 (1977).

Additionally, it is submitted that the concept of judicial integrity is a further basis for affirming the decision of the Supreme Judicial Court.

Mr. Justice Brandeis, in dissenting in *Olmstead v. United States*, 277 U.S. 438 (1928), stated that the introduction into evidence of illegally obtained evidence "is denied in order to maintain respect for law; in order to promote confidence in the administration of

justice; in order to preserve the judicial process from contamination" 277 U.S. at 484.

More recently, this Court has stated that "the primary meaning of judicial integrity in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis*, 428 U.S. 433, 458-59 n. 35 (1976). Respondent respectfully suggests that the allowance into evidence of the fruits of the illegal interrogation in the case at bar would encourage police to violate the Constitution.

It was precisely this issue that the Supreme Judicial Court was making reference to when it held that:

> "(N)either may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would in effect sanction the initial violations of constitutional guarantees which . . . took place in the police barracks". *Commonwealth v. White* supra at 2812, (A. 78).

Finally, the respondent suggests that the nature of our accusatory system requires that the decision of the Supreme Judicial Court be affirmed. Thus, Chief Justice Warren, discussing the privilege against self-incrimination, stated that:

> ". . . (T)he Constitutional foundation underlying the privilege is the respect a government—state of federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state individual balance", to require the government to "shoulder the entire load", 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth". *Miranda v. Arizona* supra at 460.



Respondent submits that the unanimous decison of the Supreme Judicial Court of Massachusetts upholds the "privilege against self-incrimination—the essential mainstay of our adversary system", *Miranda* supra at 460, and should be affirmed.

## CONCLUSION

For the reasons stated above, the decision of the Supreme Judicial Court of Massachusetts should be affirmed or in the alternative, the writ of certiorari should be dismissed as improvidently granted or the case should be remanded to the Supreme Judicial Court of Massachusetts for a determination of whether their decision is based on an adequate and independent state ground.

Respectfully submitted,
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